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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SEA-LAND SERVICE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May the Department of Justice invoke the administrative orders review provisions of the Hobbs Act, 28 U.S.C. § 2341 *et. seq.?*

2. Does a Department of Justice action to set aside an order of the Federal Maritime Commission present a constitutional case or controversy?

REFERENCE TO PARTIES BELOW

The following were parties to the proceedings below:

United States Department of Justice on behalf of the United States of America, Petitioner below.

Federal Maritime Commission, Respondent below.

Sea-Land Service, Inc., Intervenor below. (Parents: Sea-Land Industries, Inc. which in turn is wholly owned by R. J. Reynolds Industries, Inc.; Affiliates: Sea-Land Industries (U.S.A.) Inc. and Sea-Land Industries, Ltd.)

Gulf - United Kingdom Rate Agreement,
Pacific Westbound Conference,
Far East Conference,
Seatrain International, S.A.,
Pacific Coast European Conference,
North Europe - U.S. - Pacific Freight Conference,
Trans-Pacific Freight Conference of Japan/Korea,
Japan/Korea - Atlantic and Gulf Freight Conference,
Trans-Pacific Freight Conference (Hong Kong),
New York Freight Bureau,
Agreements No. 10107 and 10108,
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference,
Central American and Mexico Conference,
Atlantic and Gulf/West Coast of South American Conference,

East Coast Columbia Conference,
Leeward and Windward Islands and Guianas Conference,
United States Atlantic and Gulf - Haiti Conference,
United States Atlantic and Gulf - Jamaica Conference,
United States Atlantic and Gulf - Santo Domingo Conference,
United States Atlantic and Gulf - Venezuela and Netherlands Antilles Conference, and
West Coast South America Northbound Conference.
-Intervenors below

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OPINIONS BELOW

The December 19, 1980, Opinion of the Court of Appeals in *United States of America v. Federal Maritime Commission*, 636 F.2d 792 (D.C. Cir. 1980) (D.C. Cir. No. 79-1299) is reproduced at Appendix ("App.") A. The Opinion's holding was adopted in a later opinion of another panel of the same court dated December 29, 1980, in D.C. Cir. No. 79-1325. This later, unreported opinion is reproduced at App. E. The

March 13, 1981, Orders of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* are reproduced at App. C.

The August 30, 1978, Order of Approval of Agreement No. 10140-8 of the Federal Maritime Commission is reproduced at App. B.

JURISDICTION OF THIS COURT

The Court of Appeals has not entered a judgment in this case for the reason that the Suggestion for Rehearing *En Banc* of the United States was granted. (App. C.) The Supreme Court's jurisdiction is involved pursuant to 28 U.S.C. § 1254(1) which authorizes review of the judgments of the courts of appeal by writ of certiorari.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 512 provides that: "The head of an executive department may require the opinion of the Attorney General on questions of the law arising in the administration of his department."

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. § 814, is reproduced at App. D, p. 94a, hereto.

Article III, Section 2 of the Constitution of the United States is reproduced at App. D, p. 97a, hereto.

The Hobbs Act, at 28 U.S.C. § 2344, provides that:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

The Hobbs Act, at 28 U.S.C. § 2348 provides that:

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interest are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 C.F.R. § 0.25 states in pertinent part that:

Subject to the general supervision and direction of the Attorney General the following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General in charge of the Office of Legal Counsel:

(a) Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.

* * * * *

STATEMENT OF THE CASE

Pursuant to Section 15 of the Shipping Act, 1916, 46 U.S.C. § 814, common carriers by water which seek to enter into and implement certain types of agreements which, *inter alia*, fix or regulate transportation rates or competition, must first seek the approval of the Federal Maritime Commission ("Commission"). If approved, these agreements are exempt from the prohibitions of the antitrust laws. In accordance with Section 15, the members of the Gulf/United Kingdom Conference (of which Petitioner Sea-Land Service, Inc., "Sea-Land," is a member), Seatrain International, S.A., and United States Lines, Inc. sought Commission approval of a 48-hour rate agreement—assigned Agreement No. 10140. Agreement No. 10140 was approved on May 1, 1975, and permitted its members to set rates in the U.S. Gulf/United Kingdom trade provided that, upon 48-hours' notice, the parties could independently deviate from the previously agreed upon rate. The agreement extended the rate making power to member carriers serving the trade whether by all-water service from U.S. Gulf ports or by intermodal service from U.S. South Atlantic ports.

At issue is the January 11, 1978, request by the parties that the Commission grant an extension of the existing agreement. If granted, this extension would

have been Amendment No. 8 of the original agreement. Approval of Amendment No. 8 by the Commission was opposed by the Department of Justice ("Department"). No other protest was filed.

On August 30, 1978, the Commission issued its Order of Approval extending Agreement No. 10140 until February 29, 1980.

On March 19, 1979, the Department filed a Petition for Review of the approval of Agreement No. 10140-8 in the United States Court of Appeals for the District of Columbia Circuit. The Petition was filed pursuant to the Hobbs Act, 28 U.S.C. §2341 *et. seq.* In the Court of Appeals the Department argued that the Commission lacked the statutory authority to approve an agreement fixing rates which included a division for inland carriers. On April 24, 1979, the Court of Appeals granted Sea-Land's motion for leave to intervene.

Sea-Land intervened in the Court of Appeals for the specific purpose of challenging the Department's petition for review for the following reasons, to wit:

> *First,* the Department's petition was unauthorized by the Hobbs Act pursuant to which it was filed and
>
> *Second,* in any event the petition was insufficient to invoke the judicial power of the Court by virtue of its failure to present a justiciable case or controversy as required by Article III, Section 2 of the U.S. Constitution.

In an opinion dated December 19, 1980, the Court of Appeals held that the Commission did have statutory authority to approve Agreement No. 10140-8 but remanded for further consideration by the Commission because it "failed to secure sufficient information on which to base an informed judgment. . . . " (App. A, p.

3a) With regard to Sea-Land's two-pronged challenge, however, the Court of Appeals held that the Department, "[M]ay challenge the order approving this agreement by invoking the Hobbs Act's judicial review provisions in favor of a 'party aggrieved.' " The Court also held that, "[T]his case is constitutionally justiciable inasmuch as there is concrete adversement between the parties and the controversy is of the sort traditionally resolved by courts." (App. A, p. 62a and 63a)[1]

Petitions for Rehearing and Suggestions for Rehearing *En Banc* were filed by both the Department and by Sea-Land. As is pertinent to this case, the Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing *En Banc* of Sea-Land on March 13, 1981. (App. C) The Department's Suggestion for Rehearing *En Banc* was granted, however, and further consideration is currently pending.

REASONS FOR GRANTING THE WRIT

In a sense, it is unfortunate that the caption in this case is different before this Court[2] than before the Court of Appeals. As *United States v. Federal Maritime Commission*, this case presented a natural extension of the

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[1]The Opinion of the Court of Appeals in D.C. Cir. No. 79-1299 was adopted, without further consideration of the issues, in an opinion of another panel of the same court in United States of America v. Federal Maritime Commission, No. 79-1325 (D.C. Cir. December 29, 1980) in which Sea-Land raised the same objections to a Department petition for review of another unrelated order of the Commission. The opinion in D.C. Cir. No. 79-1325 is reproduced at App. E hereto. We respectfully urge the Supreme Court to review the dissent of Judge Markey in No. 79-1325.

[2]Rule 33 of the Rules of the Supreme Court requires that document covers bear the "caption of the case as appropriate in this Court," in order to reflect the actual alignment of the parties.

holding of this Court in *United States v. Interstate Commerce Commission*, 78 F.Supp. 580 (D.D.C. 1948), *rev'd* 337 U.S. 426 (1949) (discussed *infra*) ("*I.C.C.* case"). In both cases the Department of Justice, on behalf of the United States, brought an action to set aside the order of a regulatory agency. In the Opinion of the Court of Appeals, no recognition is given this clear similarity. Rather, it is erroneously stated that Sea-Land has sought to distinguish the *I.C.C.* case. (App. A, p. 31a) Quite to the contrary, the Supreme Court's reasoning in *I.C.C.* is at the heart of Sea-Land's contentions that *United States v. Federal Maritime Commision* does not present a constitutional case or controversy.

If anything is clear from the holding of the *I.C.C.* case it is that a judgment about the justiciability of an action cannot be made on the basis of the mere surface or nominal identities of the parties; a more penetrating inspection is often necessary. Sea-Land prays this Court to apply the holding of the *I.C.C.* case to *United States v. Federal Maritime Commission* and respectfully submits that the inspection will fail to reveal adverse real parties in interest.

The Opinion of the Court of Appeals correctly recognizes that Sea-Land's challenge to the justiciability of the Department's Petition for Review presents a question of first impression. (App. A, p. 11a) Couched in the holding of the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), the question becomes whether this challenge to the statutory authority of the Commission, when brought by the Department having no pecuniary or proprietary interest at stake, presents this Court with "the kind of controversy courts traditionally resolve." (*Id.* at 696) (*See* dissent of Judge Markey in D.C. Cir. No. 79-1325, App. E, p. 119a)

When the Department protested Commission extension of Agreement No. 10140, it submitted neither a factual nor an evidentiary protest. Rather, it chose the occasion of the eighth amendment to a previously unprotested agreement to challenge the threshold underlying statutory authority of the Commission to approve the basic agreement. In this context, Supreme Court scrutiny of the justiciability of the Department's Petition for Review is all the more urgent.

The Department petitioned for review of the Commission's approval of Agreement No. 10140-8 by invoking the judicial review authority made available to "aggrieved" persons by the Hobbs Act. At 28 U.S.C. § 2344, that Act requires that: "The action shall be against the United States." At 28 U.S.C. §2348, that Act states further that:

> The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. . . . The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

The Opinion of the Court of Appeals is in direct conflict with the legislative history of this and other provisions of the Hobbs Act which evince the intent of Congress to withhold from the Department the judicial

review provisions of the Act. Moreover, in finding that a justiciable case or controversy has been presented, the Opinion marks a sudden departure from previous opinions not only of the Supreme Court, but of other Federal courts. Contrary to the Opinion, whether the Department has standing as a party aggrieved is not at issue, either with regard to analysis of the Hobbs Act or with regard to whether the Department's petition presents a case or controversy.

I.

THIS CASE DOES NOT PRESENT THE QUESTION WHETHER THE DEPARTMENT HAS STANDING AS A PARTY AGGRIEVED. RATHER, IT INVOLVES THE DUAL QUESTIONS WHETHER THE DEPARTMENT'S PETITION IS AUTHORIZED BY CONGRESS OR PRESENTS AN ADVERSARY CASE OR CONTROVERSY.

In furtherance of narrowing the issues presented and due to the mistaken attention given them below, Sea-Land considers it useful to discuss preliminarily what issues are not presented.

Sea-Land disputes the justiciability of the Department's petition for review. The concept of justiciability, which expresses the jurisdictional limitation placed on Federal courts by the "case or controversy" requirement of Article III, Section 2 of the Constitution, is such that the essential criteria may be found present or lacking for a variety of reasons. Framing issues of justiciability is indeed a most complex task.

In the landmark case of *Flast v. Cohen*, 392 U.S. 83 (1968), Chief Justice Warren stated for the majority, that:

> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the

> various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . ." Poe v. Ullman, 367 U.S. 497, 508, 6 L Ed 2d 989, 999, 81 S Ct 1752 (1961). [*Id.* at 95] [Footnotes omitted]

Thus, standing to sue is but a single feature of justiciability, which may be lacking for other reasons. Indeed, the approach to the question of justiciability is confused when the issues involve only one of these features of the overall concept of justiciability. The Opinion of the Court of Appeals, however, casts the issue of justiciability in terms of "traditional standing doctrine" by assessing the presence of *one*, "injury in fact" and, *two*, an "interest arguably within the Zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (App. A, p. 13a)[3] In this manner, the Court of Appeals determined that the Department has been "aggrieved" as required by the Hobbs Act. However, in *Da Costa v. Laird*, 471 F.2d 1146, (2d Cir. 1973) the Court of Appeals by-passed a determination of standing to rule that a claim was not

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[3] The Opinion relies, in support of this two-pronged test, upon Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) ("*Camp*") and Barlow v. Collins, 397 U.S. 159 (1970) ("*Collins*").

justicable because, there, a political question was presented. The court held that, "[T]he standing of a party need not come into question if a court determines that for other reasons the issue raised before the bench is nonjusticable." (*Id.* at 1152)

"Traditional standing doctrine" is considered to present a "constitutional" limitation on Federal jurisdiction and a prudential limitation on its exercise. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) this Court stated as to the "constitutional limitation," that:

> In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. [*Id.* at 99; citations omitted]

and as to the "prudential limitation," that:

> Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part. . . . [*Id.* at 99-100]

This is the "traditional standing doctrine" presented in the *Camp* and *Collins* cases upon which the Opinion of the Court of Appeals relies. If there is a single thread of strict continuity in the confusing array of "standing" cases, however, it is that standing is but an "aspect" of justicability as a limitation on Federal court jurisdiction. *Warth v. Seldin, supra,* 422 U.S. at 498; *Simon v. Eastern*

Kentucky Welfare Rights Organization, 426 U.S. 26, 37 (1976); *Flast v. Cohen, supra*, 392 U.S. at 98.

One cannot resolve the case or controversy issue by reference only to the "traditional standing doctrine" outlined briefly above. In speaking of the case or controvery limitation on judicial power, this Court stated in *Flast v. Cohen, supra*, that: "As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." (*Id.* at 94)

Thus it is that Sea-Land's arguments to the Court of Appeals never required that Court to resolve the application of the "traditional standing doctrine." Whether in enacting the Hobbs Act and predecessor legislation Congress intended to permit the Department to avail itself of the judicial review provisions (discussed, *infra*, p. 13) does not depend upon whether traditional standing criteria can be met. Likewise, whether the petition for review at issue presents a justiciable case or controversy can be resolved without recourse to questions of "injury in fact" or "zone of interest." As will be argued by Sea-Land, *infra*, p. 21, the case or controversy may be lacking though a party may have satisfied "traditional standing criteria." Sea-Land contends that the Department's petition for review fails to present a justiciable case or controversy because of the failure to present a Federal Court with "genuinely adversary parties." Because the petition presents nothing more than the United States suing itself in a complete and total identity of interests, there is no actual adversity. Whether the Department is aggrieved or injured is simply irrelevant to these threshold considerations.

> First, there must be a real controversy between the parties, resting on an adverse personal interest of the challenger. Beyond this actual adversity, however, there must also be shown an injury to the legal interests of any person. [Vol. 13, Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction § 3531 p. 183 (1975)]

II.

THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS TAKEN A POSITION WITH REGARD TO A DEPARTMENT ACTION TO SET ASIDE A COMMISSION ORDER WHICH IS AT ODDS WITH NOT ONLY THE INTENT OF CONGRESS BUT ALSO WITH PRIOR HOLDINGS OF THE SUPREME COURT AND OTHER FEDERAL COURTS.

Sea-Land's petition for a writ of certiorari presents this Court with a question of first impression. What we challenge in this petition is *first*, the statutory authority and *second*, the constitutional capacity of the Department to bring a Hobbs Act petition for review to set aside a Commission order. In the particular case in point, the challenge mounted by the Department to the Commission approval of Agreement No. 10140-8 was threefold: *one*, whether the Commission has the statutory authority to approve agreements between ocean carriers which fix rates for through land and water carriage; *two*, whether the Commission held an adequate hearing; and, *three*, whether the Commission must in these circumstances consider the impact of Agreement No. 10140-8 on rates.

A. The Scope of the Hobbs Act

The administrative orders review provisions of the Hobbs Act ("Act") set forth the procedures for appealing from the orders of certain Government agencies—including the Federal Maritime Commission and the Interstate

Commerce Commission. It is the position of Sea-Land that Congress never intended to make these provisions available to the Department. The legislative history of the Act and its predecessors demonstrates that Congress intended the maintenance of a specific relationship between the Department and the agencies—a relationship which, while it will accommodate itself to inconsistent and contradictory views and even hostile positions, does not permit the Department acting in a law enforcement capacity to challenge the agencies' actions in court.

It is not surprising that Congress has taken this position. Because the Act requires that, in an appeal from a Commission order, "The action shall be against the United States,"[4] were the procedures available to the Department, the action would be both by and against the United States. As developed in the next section of this petition, except where the Department can allege proprietary interests, such an action would fail to present a truly adversary case or controversy.

The Act is the third in a series of attempts by Congress, dating back to 1910, to provide an appellate procedure whereby persons aggrieved by certain administrative orders might seek relief in the judicial courts. Since 1910, although specific procedures have changed, several themes which are crucial to the instant controversy have remained unchanged. The legislative history of the Hobbs Act indicates that, although it had several opportunities to alter basic relationships, Congress chose to preserve intact the basic role of the Department in appeals from agency orders. Sea-Land respectfully submits that this history reveals the intent of Congress to circumscribe the actions of the Department as follows:

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[4] 28 U.S.C. § 2344

1. The Department may actively defend the agency's order;
2. It may take no action and defer to the agency to provide its own defense;
3. It may confess error and take a position opposed to the agency;
4. But under no circumstances may it bring its own petition for review to set aside an agency order.

By declaring that the Attorney General is "responsible for and has control of the interests of the Government in all court proceedings under this chapter,"[5] Congress sought to inject a degree of uniformity in the Government's position in administrative matters. The need for agencies to appear as parties in their own behalf was also apparent. For this reason, Congress has authorized agencies to appear as parties of right in Hobbs Act appeals, and has declared that the Attorney General may not dispose of an action over an agency's objection.[6]

In 1910, Congress enacted the Commerce Court Act[7] to establish procedures for judicial appeal of orders of the Interstate Commerce Commission ("I.C.C."). Whereas existing procedure required that an appeal from an I.C.C. order be brought against it *eo nomine* and be defended by I.C.C. attorneys as supervised by the Attorney General, the Commerce Court Act reversed the respective roles of the agency and the Department. New procedures were explained as follows:

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[5] 28 U.S.C. § 2348

[6] 28 U.S.C. §2348

[7] Public Law 61-218, 36 Stat. 539 (1910) enacting H.R. 17536, 61st Cong., 2d Sess. (1910).

> It is further provided that suits to enjoin or set aside orders of the Interstate Commerce Commission shall be brought in the court of commerce against the United States, instead of against the Interstate Commerce Commission *as at present*. . . .
>
> The bill gives to the Attorney General entire charge and control of the interests of the Government in all cases and proceedings in the court of commerce and in the Supreme Court on appeal from the court of commerce. *This is a change in existing law.* [S. Rep. No. 355, 61st Cong., 2d Sess. at 5-6 (1910); Emphasis in original]

Congress made clear that the intent behind this reversal of roles was to foreclose in the future the potential conflict of interest esteemed to exist in the past where the I.C.C. became, "[A]s it were, the grand jury, its attorneys the prosecuting attorneys, and itself the judge trying the case. [45 Cong. Rec. 4574 (1910) (remarks of Congressman Mann)] Additionally, it was felt that by reposing an element of control in the Attorney General continuity in policy within the entire Government might be encouraged. (*Ibid.*)

The clear implication of the role reversal affected by the Commerce Court Act was the "substitution"[8] of the Department for the I.C.C. without bestowing new powers upon the Department. As a substitute for the I.C.C., the scope of the Department's authority was the same as that of the I.C.C. itself under the prior practice when the appeal was taken against the I.C.C. *eo nomine*. Indeed, Section 4 of the Commerce Court Act provided in part that:

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[8]The word "substitute" appears in the legislative history. See, S.Doc. 623, 61st Cong., 2d Sess. (1910) at 22 (Minority View) and 45 Cong. Rec. 5516 (1910) (remarks of Congressman Townsend).

> [A]ll cases and proceedings in the commerce court which but for this Act would be brought by or against the Interstate Commerce Commission shall be brought by or against the United States. . . .[9]

While the Commerce Court Act changed existing law (*supra*) the narrow reach of the transfer related in Section 4 indicates that the United States was intended to bring only such actions as were previously brought by the I.C.C. This would foreclose an action styled *U.S. v. I.C.C.* (but see discussion, *infra*).

The legislative history of the Commerce Court Act is devoid of any suggestion that, by denominating the action as against the United States or by giving the Attorney General control of the Government's interest, Congress created a new right of action to enable the Department to bring an action to set aside an agency order.

Moreover, a Conference amendment to the enacting legislation, H.R. 17536, which permitted the I.C.C. to appear as a party of right to defend its own orders,[10] did not alter the basic relationship established by Congress. Indeed, the treatment of the amendment in Conference supports the proposition urged by Sea-Land. The amendment reflects a compromise between the Majority which wanted to make the Department the statutory defendant (and the I.C.C. the intervenor of right) and the Minority which preferred the existing (and opposite arrangement). The Minority View stated that:

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[9]The fact that enacting legislation was amended to permit the I.C.C. to appear as a party of right (as in the present Hobbs Act) does not alter the basic intent to substitute the Department for the I.C.C.

[10]This amendment is the direct predecessor of the similar provision found in the Hobbs Act at 28 U.S.C. 2348.

> The *substitution* of the United States for the Interstate Commerce Commission as the defendant in suits brought to enjoin the enforcement of orders of the Commission and the control of the *defense* by the Attorney General, instead of as hitherto by the Commission itself, are also objectionable, notwithstanding the Commission is permitted to intervene. . . .
>
> The *defense* of the Commission's orders should be controlled by the Commission. . . . [Conference Report S. Doc. 623, 61st Cong., 2d Sess. (1910) at p. 22] [Emphasis added]

Significantly, the system which the Minority opposed is the system which with one exception was enacted. In place of the right to intervene, the I.C.C. was made a party of right represented by its own counsel in appeals from its orders.

While giving the Attorney General control of the interest of the Government, the Commerce Court Act permitted the agency intervention as a right to defend its own point of view unprejudiced by the action of the Department. The Commerce Court Act presaged the practice sometimes seen in the Court of Appeals today, in which the Department, on behalf of the United States, will "confess error" by the agency and submit a brief espousing the opposition position.[11]

In 1913, the Commerce Court was abolished and jurisdiction of appeals from agency orders was vested in the United States District Courts.[12] Congress, however,

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[11]Such action was taken, for example, in Commonwealth of Puerto Rico v. Federal Maritime Commission, 288 F.2d 419 (D.C. Cir. 1961).

[12]The Urgent Deficiencies Act, Public Law 63-32, 38 Stat. 219 (1913).

preserved the procedures which prevailed in the Commerce Court. (H.R. Rep. No. 64, 63rd. Cong., 1st Sess. (1913) Thus the basic relationship between the I.C.C. and the Department was unchanged.

In 1950, Congress enacted the Hobbs Act.[13] The original legislation was prepared by the United States Judicial Conference. In addition to extending the judicial review provisions to other agencies, including the Federal Maritime Commission,[14] the Judicial Conference recommended a return to pre-Commerce Court procedures. Thus, the Commission would be statutory respondent, not the Department, which would be limited to a right of intervention. These recommendations were opposed by the Department and were amended, in the words of the House Judiciary Committee, to, "[R]etain the present law." (H.R. Rep. No. 1619, 80th Cong., 2d Sess. (1948) The "present law" of course, was the procedure as originally established by the Commerce Court Act, *supra.* During hearings, the Department's witness testified in favor of retaining the relationship between the Department and the agency as first established in 1910.[15]

In testimony on the successor to the original bill,[16] the Judicial Conference's witness, Judge Orie I. Phillips, Chief Judge of the United States Court of Appeals for the 10th Circuit, also testified on the effect of the new legislation, as amended at the insistence of the Attorney General,

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[13] Public Law 81-901, 64 Stat. 1129 (1950).

[14] H.R. 1468, 80th Cong., 2d Sess. (1948).

[15] Testimony of Special Assistant to the Attorney General, Hearings on H.R. 1468, Before the Subcomm. No. 3 & 4 of the House Comm. on the Judiciary, 80th Cong., 1st Sess. ser. 2 at 65 (1947).

[16] H.R. 2916, 81st Cong., 1st Sess. (1949).

"The Attorney General has not asked for anything further than *to preserve the existing law* in his amendment."[17] (emphasis added) As enacted, the Hobbs Act reflected the amendments submitted by the Department.

The salient feature of this legislative history is the consistent intent of Congress over the years to preserve the relationship between the Department and the agency as originally formulated in 1910. As stated, Congress intended at that time to substitute the Department for the agency and to limit the courses of action available to the Department to the following:

1. The Department may actively defend the agency's order;
2. It may take no action and defer to the agency to provide its own defense;
3. It may confess error and take a position opposed to the agency;
4. But under no circumstances may it bring its own petition for review to set aside an agency order.

Congress has offered no indication in the intervening years of an intent to alter this relationship. Certainly, Congress did not expect the Department to remain silent if it disagreed with the position taken by an agency. The legislative history shows that Congress anticipated that the agency and the Department would on occasion take inconsistent, hostile, or even antagonistic positions with regard to the agencies' orders.[18] However, Congressional recognition that the Department might disagree with an

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[17]Hearings on H.R. 2916, Before the Subcomm. No. 2 of the House Comm. on the Judiciary, 81st Cong., 1st Sess. ser. 2 at 118 (1949).

[18]Id. at 115, 118. See infra, footnote 19.

agency's position is a far cry from attributing to Congress the intent to authorize the Department to actually bring an action to set aside the agency order. The three options available to the Department in a judicial appeal from an agency order are fully consistent with the possibility of disagreement.

In sum, the preceding legislative development shows quite clearly that the administrative orders review provisions of the Hobbs Act were never intended to be available to the Department. Its role under the Hobbs Act may vary but it may never be that of petitioner.

B. The Absence of Adversary Interests.

In the second part of its challenge to the Department's petition for review, Sea-Land argued before the Court of Appeals that the petition presented a legal anomaly. Because the Hobbs Act states that, "The action shall be against the United States" (*supra*), the action at issue is truly *United States v. United States.* The Attorney General appears as our nation's chief law enforcement officer, here as advocate of the antitrust laws, and not alleging a proprietary (or non-sovereign) interest of the government; therefore, there is no truly adversary conflict and hence no Article III, Section 2 "case or controversy."

As indicated previously, we are not concerned here with the "traditional standing doctrine." Whether the Department might establish injury in fact within a protected zone of interest and thereby suffer as an "aggrieved party" is not at issue. Standing is but an "aspect" of justiciability (*supra*).

Justiciability is a limitation on the exercise of the judicial power of a court. It means:

> [T]hat a court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminister when the Constitution was framed. The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a "case or controversy." [*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 150 (1951) (concurring opinion of Justice Frankfurter)]

We are concerned here with the "relationship between the parties."

The Opinion of the Court of Appeals dismissed this argument in rather summary fashion. In considering whether the controversy was justiciable, the Opinion found the *I.C.C.* case, where the United States was both plaintiff and defendant, dispositive. Moreover, relying on *United States v. Nixon, supra,* the Opinion felt that the Department's petition raised issues "of a type which are traditionally justiciable." (App. A, p. 32a) Sea-Land disagrees with this assessment of *United States v. Nixon* ("*Nixon*," as will be discussed, *infra*). More importantly, however, the Court's Opinion has failed to come to grips with the leading case on this question, that is, the *I.C.C.* case. Indeed, unlike *Nixon*, the *I.C.C.* case was brought under the immediate predecessor of the Hobbs Act. Congress was well aware of the Supreme Court's reasoning in the *I.C.C.* case[19] and "preserved" an appeal pro-

[19]The *I.C.C.* case was decided the year before the Hobbs Act was enacted. Judge Phillips, in discussing potential differences of opinion between the Department and an agency, referred to the *I.C.C.* case controversy. H.R. Rep. No. 1619, 80th Cong., 2d. Sess. 11-12 (1948) (Additional Views).

cedure that would always present judicial courts with cases or controversies.

In order to present a court with a case or controversy the action must be presented in a truly adversary context. This adversariness has been duly noted by the Supreme Court: *See, Muskrat v. United States*, 219 U.S. 346, 357 (1911) and *Flast v. Cohen, supra*, 392 U.S. at 94. It has also been described by legal commentators:

> All models of cases and controversies assume the presence of at least two genuinely adversary parties. Adversariness is desired both to establish the need for any adjudication, and to provide the foundation for sound adjudication. Judicial power is not exercised to offer advice to a single party, nor to confirm the wisdom of private settlements already reached and honored. Nor is judicial power exercised when courts doubt the existence of sufficient adversary interest to stimulate the parties to a full presentation of the facts and arguments, which in our adversary system is available only from the parties. [Vol. 13, Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction § 3520 at 164 (1975)]

As the quotation above states, the case or controversy requirements can be found only in the presence of "genuinely adversary parties." Such adversity goes beyond the presence of mere disagreement. As the Supreme Court has stated:

> In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. [*Nixon, supra*, 418 U.S. at 696]

For one thing, "adversity" means that the same party cannot be both plaintiff and defendant. It does not depend on whether the parties are nominally identical.

Lord v. Veazie, 49 U.S. (8 How.) 251 (1850); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419 (1861); *American Wood-Paper Co. v. Heft*, 75 U.S. (8 Wall.) 333 (1869).

This concept was examined, and a test was formulated for its application in the *I.C.C.* case. While decided in 1949, the *I.C.C.* case remains the foremost authority in determining whether an administrative appeal involving the United States presents a court with truly adversary parties. There, the United States brought an action pursuant to the Urgent Deficiencies Act, *supra*, for review of an I.C.C. order which had denied it a claim for reparations from railroads. The United States stood before the court as a shipper of a significant volume of goods. The District Court dismissed the action for failure to present a case or controversy, "Naturally there cannot be a case or controversy if the same party is both plaintiff and defendant." (78 F.Supp. 580, 583)

While the Supreme Court reversed, it did so for reasons that show beyond question that the Department's petition in this action fails the standard announced by the Court. The salient portion of the opinion is that one must look behind the names to see if a justiciable controversy is present. The holding of the *I.C.C.* case is that the nominal identity or label, which may only superficially identify a party, must be stripped away to reveal the real party in interest. When the Supreme Court applied that test to the facts presented, it found that the real controversy was between a shipper and the railroads, "This suit therefore is a step in proceedings to settle who is legally entitled to sums of money, the Government or the railroads." (337 U.S. at 430) The Court cautioned against the deceiving quality of a "surface anomaly" (337 U.S. at 431-432) and required penetration beyond nominal labels. If, having done this, truly adversary

parties remain lacking, the action must be dismissed. The *I.C.C.* case recognizes that, "[A] suit filed by John Smith against John Smith might present no case or controversy which courts could determine." (337 U.S. at 430).[20]

The *I.C.C.* case stands for no more than the proposition that when legitimate adversaries do in fact exist, the nominal identity of the parties will not destroy jurisdiction. This view of the precedential value of the *I.C.C.* case was taken by the court in *United States v. Easement and Right of Way, Etc.*, 204 F.Supp. 837 (E.D. Tenn. 1962). That case correctly recognized that the *I.C.C.* case support for a Department action to set aside an agency order is limited to situations in which the Government alleges a proprietary, and thus adversary, interest. (*Id.* at 840)

In *Ishverlal Madanlal Co. v. SS Visha Mangal*, 358 F.Supp. 386 (S.D. N.Y. 1973), owners of cargo brought a negligence action against a vessel and her owner. One of the cargo owners was an arm of the Government of India; likewise the Government of India was part owner of the vessel. Defendants moved to dismiss for lack of a case or controversy. The motion was denied because the court ruled that the true plaintiff was not the owner of the

[20]The Supreme Court also found that the action was not barred by the Urgent Deficiencies Act. Sea-Land's argument with regard to the intent of Congress as expressed in the legislative history of the Hobbs Act relates to the role of the Attorney General, as chief law enforcement officer, concerned with Government-wide consistency in policy. Only in that capacity is the relationship which Congress intended with administrative agencies meaningful. If the Attorney General dons the cloak of a shipper, however, and represents the Government's proprietary interests instead, then, as the *I.C.C.* case correctly stated, the United States as a shipper is entitled to the same "powers of self protection accorded all other shippers." [337 U.S. at 431].

cargo but the cargo insurer. This was a subrogation claim. Citing the *I.C.C.* case, the court stripped away the nominal identities of the parties, "[T]o look to the real parties in interest, and to the nature of the underlying controversy in order to ascertain whether or not there is a real controversy and whether jurisdiction exists." (*Id.* at 390)

The Attorney General is authorized by 28 U.S.C. § 512 to render opinions on questions of law for executive branch agencies. This function has been delegated to the Department's Office of Legal Counsel ("OLC"). (28 C.F.R. § 0.25 (1979)). On April 22, 1977, the OLC issued an opinion concerning the justiciability of a dispute between the Internal Revenue Service and the Postal Service growing out of the computation of a transportation tax. The OLC found the dispute to be non-justiciable and recognized that, "The leading case on the issue of justiciability in this context is *United States v. I.C.C.*..." [1 *Opinions Of The Office Of Legal Counsel Of The United States Department of Justice* 79 (L. Ulman Ed. 1980) (Opinion 77-22, Apr. 22, 1977)]

The OLC found that the analysis of the *I.C.C.* case, when applied to the facts presented, required a different conclusion. The OLC reasoned that:

> [H]ere the basic question is which of two governmental entities is entitled to money appropriated by Congress. It is in essence an interagency dispute. [*Id.* at 81]

After applying the directive of the *I.C.C.* case, the OLC opined that there was no "non-governmental 'real party in interest.'" (*Id.* at 83).

Most recently, the Supreme Court in the *Nixon* case, *supra*, warned against founding justiciability upon a

"surface inquiry." (418 U.S. at 693) After "looking behind the names," the Court in *Nixon* found an independent Special Prosecutor specifically authorized by regulation to take the very action (issuance of a subpoena to the President) which was at issue. *Nixon*, like the *I.C.C.* case, is but an example of the concrete adverseness that may, on further inspection, lie concealed by nominal identities.

The question presented then, is: What will be revealed by further inspection of the nominal identities present when the Department brings an action to set aside Commission approval of Agreement No. 10140-8? Put another way, the question is: Who are the real parties in interest in the Department's petition? Sea-Land respectfully submits that, when the Department's Petition consists only of challenges to the Commission's statutory authority or assertions of procedural and legal defects in its order of approval, and presents no dispute with a private party, there are no underlying adversary interests which might confer justiciability. Moreover, in the following words of the Supreme Court in *Nixon*, the present dispute between these two government agencies seems more akin to "mere disagreement" than to "the kind of controversy courts traditionally resolve":

> In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. [*Id.* at 696)

CONCLUSION

The Petition for Review of the Department, acting on behalf of the United States, which challenges the statutory authority of the Commission and not the actions of any private parties, does not present a justiciable case or controversy.

The Supreme Court has declared that the Commission, not the Department, is the "public arbiter of competition in the shipping industry. . . ." (*Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 53 (1978). On the other hand this Court has also declared that, "The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." (*Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) In these premises, Sea-Land respectfully submits that there are present here no adverse legal interests and no justiciable case or controversy. We urge that a writ of certiorari should issue to review the Opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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June 10, 1981

CERTIFICATE OF SERVICE

I hereby certify that today, this 10th day of June, 1981, I have served three (3) copies of the foregoing Petition for Writ of Certiorari and of the separately filed Appendix by United States mail, first class postage prepaid or by personal delivery, to each of the following:

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